

Tom Brown

From: Heidi Harvey
Sent: Tuesday, January 24, 2006 2:56 PM
To: 'ram@macerolaw.com'
Cc: Tom Brown; 'Richard F. Cheslofska'
Subject: Response to Request re Proposed Amended Answer and Counterclaim

Rosemary,

I reviewed your proposed counterclaim; we cannot consent to its filing.

First, there is no reason why this counterclaim could not have been made much earlier in the case. The extension of fact discovery jointly sought and just approved by the Court leaves no provision for adequate discovery by Qwest of your affirmative claims. Therefore, the lateness of the amendment is highly prejudicial.

Second, please be clear on the merits, that the mark CONQWEST is not "famous" and that it should not have been registered based on Qwest's prior rights. Indeed, your proposed amendment appears to reduce this case to a priority battle; issues of similarity of the marks and services and likely confusion seem foregone conclusions in view of your allegations of trademark infringement and dilution. Kurt Lewis reminded in a telephone conversation today that he has pointed out to you some time ago that this would be the effect of making a counterclaim.

I will reserve our other objections for our opposition to the motion to amend and/or our responsive pleading, if the amendment is allowed.

Since you are proposing to amend your answer and counterclaim, I wish to point out that a number of the affirmative defenses asserted seem to be unrelated to the facts of this case. In particular, the affirmative defenses in paragraphs 3, 4, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, and 22 go to things such as consent, settlement, breach of contract, negligence, and fraud and misrepresentation, none of which are in the case. We ask that, in this amendment, you eliminate such affirmative defenses. This occurred to me because my Rule 30(b)(6) notice of deposition will seek a witness to provide the fact basis for all the affirmative defenses of ConQwest. To the extent that you do narrow the affirmative defenses in response to this request, obviously we will not oppose your motion to amend to that extent.

Heidi

P.S. I took the liberty today of copying your colleague on the message because we both have a number of issues up in the air, and it appears to me that he was not aware of the letter that Tom sent over this morning.